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No. 80-1174

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

SOO LINE RAILROAD COMPANY,

Petitioner,

VS.

TOWN OF EAST TROY, a municipal corporation,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

REPLY TO RESPONSE IN OPPOSITION

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RESPONDENT'S MISSTATEMENTS SHOULD NOT PRECLUDE THIS COURT'S REVIEW

We will limit our reply to respondent's numerous misstatements of fact and law.

Respondent characterizes the Soo Line as a wrongdoer attempting to "escape responsibility" for its actions. Nothing could be further from the fact (Resp., p. 11).

The Soo Line made substantial settlement payments to each and every one of the Lake Beulah property owners whose wells were in any way contaminated (R. 3). It resisted payment only to the Town, which had no wells, water, or other property affected by the accident and was not supplying water to any resident of Lake Beulah at the time of the occurrence (Tr. 90, 517).

Equally false is respondent's representation that it incurred over $500,000 of "actual damage" that "had nothing to do with the application for or use of federal grant funds" (Resp., pp. 2. 6). In truth, the Town's alleged "loss" consisted of its voluntary application and receipt of the $500,000 HUD grant which it then chose to spend[1] on the formation of a sanitary district, the purchase of land, and the study and construction of its new public well system that was not in existence at the time of the occurrence and was never damaged by the Soo Line. The fact that under these circumstances, the District Court and the Seventh Circuit treated the Town as "an injured party" entitled to "routine" application of the collateral source rule is precisely why this case merits this Court's review.

Respondent's further claim that "the public purposes of the Community Development Act have been well served in this case" (Resp., p. 9) is as preposterous as its claim that the Town's construction of a new well "literally saved the unincorporated community of Beulah Station from oblivion" (Resp., p. 9). In fact, the phenol spill never progressed more than a 1,000 feet from the accident site (Tr. 89, 757, 761, 807) (Def. Ex. 257B)! And, even in that limited area, the contamination was

[1] The grant consisted of a $500,000 letter of credit against which the Town then wrote checks (Def. Ex. 267; Tr. 713-714).

eventually evaporated in a nearby swamp (Tr. 674, 705, 833, 838).

Finally, the Town claims that this case does not fall into any of the nonexclusive categories of cases appropriate for this Court's review under Supreme Court Rule 17 (Resp., pp. 4-5). On the contrary, the unprecedented "make damage" use of the collateral source rule permitted here is an important question calling for the exercise of this Court's supervisory power (Supreme Court Rule 17.3, 17.5) so that similar improper recoveries by public as well as private entities may be prevented. While respondent's Wisconsin Nuisance Law analysis is totally wrong,[2] the instant collateral source rule application is not dependent upon or limited by any state law provision, and unless corrected by this Court, will be precedent for similar misapplications of the rule and the misuses of all types of federal grants in every state.

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[2] Contrary to respondent's assertions, the "injury peculiar to complainant" requirement in Wisconsin public nuisance actions is expressly made applicable to "counties, cities, villages and *towns*" (emphasis added). Wis. Stat. § 823.01.

CONCLUSION

For these reasons and reasons set forth in the Petition for Certiorari, petitioner Soo Line Railroad Company respectfully requests that the Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit be granted.

Respectfully submitted,

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